No. 20,876

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHNNY R. AUSTAD AND DOROTHY AUSTAD,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF ARIZONA

BRIEF FOR THE APPELLEE

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JURISDICTIONAL STATEMENT

This action was brought by the United States to foreclose a mortgage held by the Small Business Administration on certain property of the Austad Steel Co., and for a deficiency judgment on the note secured thereby against the Company and against the appellants as guarantors. The jurisdiction of the district court was invoked under 28 U.S.C. 1345. Final judgment granting the requested relief was entered on January 11, 1966. Appellants filed

a timely notice of appeal (R. 97). 1/ The jurisdiction of this Court is based on 28 U.S.C. 1291.

COUNTERSTATEMENT OF THE CASE

In December, 1958, the Austad Steel Co., Inc. (hereinafter referred to as "the company") borrowed $250,000.00 from the Small Business Administration (SBA), an agency of the United States Government. In return for that sum, the company, by its president and Secretary-Treasurer, appellants herein, executed a note for that amount (R. 12-13). That note was executed on SBA printed form No. 147, and provided, as here relevant (R. 12-13):

> The security rights of Payee and its assigns hereunder shall not be impaired by * * * any indulgence, including but not limited to (a) any renewal, extension, or modification which Payee may grant with respect to the Indebtedness or any part thereof, or (b) any surrender, compromise, release, renewal, extension, exchange, or substitution which Payee may grant in respect of the Collateral, or (c) any indulgence granted in respect of any endorser, guarantor, or surety.

In addition, the SBA received as security a mortgage on certain real property of the company (R. 14-20), and also an individual unconditional guaranty of payment by the Austads, appellants herein (R. 21). That guaranty of the company's debt to SBA was executed, as required by SBA practices, on SBA printed form No. 148, and provided that:

1/ "R ___ " citations are to the Transcript of Record prepared by the clerk.

The undersigned hereby grants to SBA full power, in its uncontrolled discretion and without notice to the undersigned, but subject to the provisions of any agreement between the Debtor or any other party and SBA at the time in force, to deal in any manner with the Liabilities and the collateral, including, but without limiting the generality of the foregoing, the following powers:

(a) To modify or otherwise change any terms of all or any part of the Liabilities 2/ or the rate of interest thereon (but not to increase the principal amount of the note of the Debtor to SBA), to grant any extension or renewal thereof and any other indulgence with respect thereto, and to effect any release, compromise or settlement with respect thereto;

(b) To enter into any agreement of forbearance with respect to all or any part of the Liabilities, or with respect to all or any part of the collateral and to change the terms of any such agreement;

(c) To forbear from calling for additional collateral to secure any of the Liabilities or to secure any obligation comprised in the collateral;

(d) To consent to the substitution, exchange, or release of all of any part of the collateral, whether or not the collateral, if any, received by SBA, upon any such substitution, exchange, or release shall be of the same or of a different character or value than the collateral surrendered by SBA;

/ The term "Liabilities" is defined in the guaranty as he note, the interest thereon, and all other sums payale with respect thereto.

(e) In the event of the nonpayment when due, whether by acceleration or otherwise, of any of the Liabilities, or in the event of default in the performance of any obligation comprised in the collateral, to realize on the collateral or any part thereof, as a whole or in such parcels or subdivided interests as SBA may elect, * * * or by foreclosure or otherwise, or to forbear from realizing thereon, all as SBA in its uncontrolled discretion may deem proper, and to purchase all or any part of the collateral for its own account at any such sale or foreclosure, such powers to be exercised only to the extent permitted by law.

The obligations of the undersigned hereunder shall not be released, discharged or in any way affected, nor shall the undersigned have any rights or recourse against SBA, by reason of any action SBA may take or omit to take under the foregoing powers.

In case the Debtor shall fail to pay all or any part of the Liabilities when due, whether by acceleration or otherwise, according to the terms of said note, the undersigned, immediately upon the written demand of SBA, will pay to SBA the amount due and unpaid by the Debtor as aforesaid, in like manner as if such amount constituted the direct and primary obligation of the undersigned. SBA shall not be required, prior to any such demand on, or payment by, the undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral. The undersigned shall have no right of subrogation whatsoever with respect to the Liabilities or the collateral unless and until SBA shall have received full payment of all the Liabilities.

The obligations of the undersigned hereunder * * * shall not be released, discharged or in any way affected, nor shall the undersigned have any rights against SBA * * * by reason of the fact that the value of any of the collateral, or the financial condition of the Debtor * * * may have changed or may hereafter change; nor by reason of any deterioration, waste, or loss by fire, theft, or otherwise of any of the collateral unless such deterioration, waste, or loss be caused by the willful act or willful failure to act of SBA. (Emphasis supplied).

On December 10, 1964, a complaint was filed by the United States in the United States District Court for the District of Arizona (R. 2-10, 77) alleging, inter alia, the above facts, as well as the default by the mortgagor. The Government sought a decree of foreclosure of the mortgage against the company, and a deficiency judgment against both the company and the Austads as guarantors (R. 10-11).

The Austads, in their amended answer (R. 63-64), 3/ admitted all the above facts, but asserted as affirmative defenses (1) that the United States failed to bring an action on the indebtedness within sixty days after demand by defendants to do so (R. 65), (2) that the United States was estopped by its "unconscionable" and "willful" delay in bringing this action to recover on the guarantee (R. 63-64), (3) that the United States was "guilty of laches which bar it from recovery" against the Austads on the guarantee (R. 64) and (4) that the Austads were released under the guarantee agreement by the United States "repeatedly waiving principal payments when due and accepting interest only on the obligation" (R. 64). 4/

3/ The Austads had left Arizona, and it was necessary to obtain service on them in California (R. 99). Other defendants were served in California and Texas as well as Arizona (R. 99).

4/ Appellants do not argue this defense to this Court, and it is not further discussed.

The United States then moved for judgment on the pleadings (R. 57), asserting that it was entitled to judgment as a matter of law on the admitted facts in the pleadings. This motion was resisted by the Austads (R. 65-67). By minute entry of August 2, 1965 (set forth on an unnumbered page of the Record following R. 67), the district court determined that the government's motion should be granted.

On January 11, 1966 the court entered a final judgment and a decree of foreclosure (R. 84-92). As here relevant, judgment was entered against the Austads for $213,092.50 (R. 87-88). 5/ From that judgment the Austads have appealed.

ARGUMENT

INTRODUCTION

The Austads unconditionally guaranteed payment of the note of the company which they controlled in order to obtain a loan from SBA. Both the note and the guaranty were executed on the required printed SBA forms used nationwide for this purpose. Now that the loan is in default, they attempt to avoid or delay enforcement of their obligation by asserting that the government's exercise of the rights specifically given it by appellants in the guaranty agreement in order to obtain the loan for their company somehow released them from their obligation.

5/ That amount to be reduced by the proceeds from the foreclosure sale.

We show that the rights of the parties under the printed notes and guaranties utilized by SBA in its nationwide program are governed by federal law which excludes state rules which are inconsistent therewith. The federal rule in this case is that set forth in the printed note and guaranty. We then show that the defenses which appellants assert have all been waived by them for their own economic benefit, and may not be raised here to defeat recovery.

I. FEDERAL LAW GOVERNS THE CONSTRUCTION OF THIS CONTRACT OF GUARANTY AND COMPELS A UNIFORM INTERPRETATION.

A. The Paramount Federal Interest In The Integrity of the Nationwide Program Of Assistance To Small Business Compels Initial Reference To Federal Law.

It is by now well settled that Congress has by the Rules of Decision Act, 28 U.S.C. 1652, provided for the application of federal law to questions of federal rights and liabilities arising from large-scale federal programs and transactions. 6/ The Supreme Court has held that one of the main purposes of that Act and Article VI, clause 2 of the Constitution (the Supremacy clause) "was to avoid

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6/ 28 U.S.C. 1652 provides as follows:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. [Emphasis supplied.]

the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls" through application of state law. United States v. Allegheny County, 322 U.S. 174, 183.

In a long line of decisions, the Supreme Court has made it clear that the paramount federal interest in matters arising out of nationwide government programs and vast federal transactions compels the application of federal law. 7/

Thus, federal rather than state law has been applied to ascertain the liability of the maker of accommodation paper to a federal corporation insuring the holder's deposits (D'Oench Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447); to decide the extent of the obligation of the guarantor of a forged endorsement on a check drawn by the United States (Clearfield Trust Co. v. United States, 318 U.S. 363); to determine whether particular machinery was the property of the United States or its private contractor for purposes of imposing state property taxes (United States v. Allegheny County, 322 U.S. 174); to determine the obligation of an endorser of a government check (National Metropolitan Bank v. United States, 323

7/ E.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 366; United States v. Allegheny County, 322 U.S. 174, 181-83; United States v. Standard Oil Co., 332 U.S. 301, 306.

U.S. 454); to adjudicate a third-party tortfeasor's responsibility for damages suffered by the United States as a result of an injury inflicted upon a serviceman (United States v. Standard Oil Co., 332 U.S. 301); to decide whether a liquidated damage clause in a government procurement contract was enforceable (Priebe & Sons v. United States, 332 U.S. 407); to interpret the nature of the rights and obligations created by bonds issued by the government. (Bank of America T. & S.A. v. Parnell, 352 U.S. 29); to the interpretation of a lease to which an agency of the United States was a party (United States v. 93.970 Acres, 360 U.S. 328); to settle the obligation of the Veterans' Administration after default under mortgages it had guaranteed (United States v. Shimer, 367 U.S. 374); and to fix the ownership of United States savings bonds after the death of one of the co-owners (Free v. Bland, 369 U.S. 663).

This Court has consistently applied that principle as well. For example, in this Court's decision in United States v. View Court Garden Apartments, 268 F. 2d 380, 382 (C.A. 9), certiorari denied, 361 U.S. 884, it was stated:

> [W]e do find it to be clear that the source of the law governing the relations between the United States and the parties to the mortgage here involved is federal.

The rule there set forth has been consistently followed by

this Court 8/, as well as by the other Courts of Appeals.9/ For, as the Supreme Court said in United States v. Allegheny County, 322 U.S. at 183:

> the validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state.

Thus it is plain that the SBA guaranty form 148 must be interpreted by the use of federal law. As we now show, the federal law requires a uniform rule rather than the adoption of varying state rules.

B. The Effective Administration of the Federal Program of Aid to Small Business Requires the Application of A Uniform Rule Rather Than the Adoption of Local Rules as the Federal Rule.

The determination that federal law governs an issue arising under a nationwide program usually requires the

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8/ Liebman v. United States, 153 F. 2d 350, 352 (C.A. 9); United States v. Mathews, 244 F. 2d 626, 628 (C.A. 9); McKnight v. United States, 259 F. 2d 540 (C.A. 9); Bumb v. United States, 276 F. 2d 729 (C.A. 9); American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F. 2d 640, 644 (C.A. 9); United States v. Queen's Court Apartments, Inc., 296 F. 2d 534 (C.A. 9); Woodbury v. United States, 313 F. 2d 291 (C.A. 9); Clark Investment Co. v. United States, 364 F. 2d 7 (C.A. 9).

9/ E.g., American Auto Insurance Co. v. United States, 269 F. 2d 406, 408 (C.A. 1); Penagaricano v. Allen Corp., 267 F. 2d 550 (C.A. 1); United States v. LeRoy Dyal Co., 186 F. 2d 460 (C.A. 3); Seabrook Farm v. C.C.C., 206 F. 2d 93 (C.A. 3); American Houses v. Schneider, 211 F. 2d 881 (C.A. 3); United States v. Flower Manor, Inc., 344 F. 2d 958 (C.A. 3); R.P. Farnsworth & Co. v. Electrical Supply Co., 112 F. 2d 150, 154 (C.A. 5), rehearing denied 113

(Continued)

application of a uniform rule rather than the adoption of principles of local law as the federal rule. For the adoption of local law tends to defeat the very purpose of the supremacy clause of the Rules of Decision Act -- the avoidance of "disparities, confusions and conflicts" following from the application of varied state law rules. See United States v. Allegheny County, 322 U.S. 174, 183.

The chief consideration upon which turns the determination of whether a uniform rule or local law is ultimately to be applied as the federal law is the need for uniformity of administration. Thus, in the Clearfield Trust decision, supra, the Supreme Court declared that except for the "occasional" instances in which there is no compelling need for uniformity, federal law must be applied to assure the uniform administration of the nationwide federal program or activity involved (318 U.S. at 367):

> In our choice of the applicable federal rule we have occasionally selected state law. See Royal Indemnity Co. v. United States, supra, [313 U.S. 289, 296-297]. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity

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9/ (Continued) F. 2d 111, certiorari denied, 311 U.S. 700; United States v. Sylacauga Properties, Inc., 323 F. 2d 487, 491 (C.A. 5); United States v. Taylor, 333 F. 2d 633, 637-638 (C.A. 5); United States v. Helz, 314 F. 2d 301, 303 (C.A. 6); United States v. Starks, 239 F. 2d 544 (C.A. 7); United States v. McCabe Co., 261 F. 2d 539 (C.A. 8); United States v. Chester Park Apts., Inc., 332 F. 2d 1, 3-4 (C.A. 8); certiorari denied 379 U.S. 901; Southwest Engineering Co. v. United States, 341 F. 2d 998, 1000 (C.A. 8); certiorari denied 382 U.S. 819; Southwest Engine Co. v. United States,

in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. * * *.

1. The SBA Program

The SBA program clearly requires a uniform federal rule for the interpretation of contracts of guaranty of this nature. The lending authority conferred upon SBA by the Small Business Act of 1953 10/ is part of a large-scale, nationwide congressional program for the assistance and protection of the country's small business concerns.

In creating the SBA in 1953, Congress expressly noted that the security and economic well-being of the Nation depended on the development and encouragement of small business enterprise. Sec. 202, 67 Stat. 232; 15 U.S.C. 631. The SBA was created to assist small business conerns when such concerns were unable to obtain financial assistance at reasonable rates from normal financial sources. Indeed, while the SBA is empowered to make loans to small business concerns either for designated capital expenditures or for specified types of working capital, 15 U.S.C. 636(a), it may not extend such financialassistance unless such assistance is not available elsewhere on reasonable terms. 15 U.S.C. 636(a)(1). Although the SBA is to make loans which

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10/ After several amendments, not here relevant, the Act was re-enacted in 1958, 72 Stat. 384, 15 U.S.C. 631-651. All U.S. Code references are for convenience given to the current edition of the code.

are not commercially available, and thus perhaps not as well secured as would be the case for a commercial loan, 11/ Congress has required the SBA to take such security "as reasonably to assure repayment." 15 U.S.C. 636(a)(7). Thus the SBA was created by Congress in order to fill a need which ordinary commercial sources could not supply, but was directed to safeguard the taxpayers' money as well as possible consistent with its intended function. In order to accomplish that beneficent purpose, SBA utilizes a series of printed forms throughout the country, for its transactions, so that it may obtain both speed and certainty in its program.

2. The Facts of This Case.

In this instance, the facts of the case demonstrate the need for a uniform rule. The guaranty was executed on SBA Form No. 148, a printed form in use nationwide by guarantors under the extensive SBA program. 12/ The mobility

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11/ Were the loan to be secured as adequately as would be commercially demanded, the assistance would be available commercially, and the SBA could not make the loan. 15 U.S.C. 636(a)(1).

12/ SBA uses three such printed guaranty forms - Nos. 148, 148A, and 148B - in order to reflect the varying participation possible in making the loans.

of those affected by the SBA notes (which are also on a printed form) and guarantees in most cases is shown by the fact that the Austads could not be found in Arizona at the time of suit, and had to be reached in California, while creditors were as far away as Texas. In many cases, of course, the principal does business in several jurisdictions, and the guarantors may be found in an even greater number of jurisdictions for service. No purpose would be served by leaving the interpretation of a guaranty to the choice of law rules of the state in which service is finally obtained. Nor would there be any purpose in having 50 possible interpretations of a uniform federal form utilized to secure federal monies paid out under constitutional and statutory authority.

For these reasons, under federal law a uniform federal rule must be adopted for the interpretation of the rights and liabilities of parties to this uniform, widely utilized, federal contract. 13/ Clearfield Trust Co. v. United States, 318 U.S. 363, 367; Free v. Bland, 369 U.S. 663, 668; United States v. View Court Garden Apartments, Inc., 268 F. 2d 380, 382 (C.A. 9) certiorari denied, 361 U.S. 884; Clark Investment Co. v. United States, 364 F. 2d 7, 9; United States v.

13/ The precedent set by this Court in Bumb v. United States, 276 F. 2d 729 (C.A. 9) in determining that federal law adopts state law in some instances as to the acquisition of various right against others has recently been followed by the Supreme Court in United States v. Yazell, 382 U.S. 341. As this Court has pointed out in Clark Investment Co. v. United States, 364 F. 2d 7, 9 (C.A. 9), however, Yazell does not apply to a case such as this where a single, nationwide, form must be interpreted. See also United States v. Carson, 372 F. 2d 429 (C.A. 6).

Chester Park Apartments, Inc., 332 F. 2d 1 (C.A. 8), certiorari denied 379 U.S. 901.

There would be no purpose served by adopting state law for the interpretation of "a nationwide act of the Federal Government, emanating in a single form from a single source," United States v. Yazell, 382 U.S. 341, 348, especially when there could be no individual negotiation as to the terms of the printed guarantees. See United States v. View Court Garden Apartments, Inc., 268 F. 2d 380 (C.A. 9), certiorari denied, 361 U.S. 884, cited with approval in Yazell, supra.

II. THE UNIFORM FEDERAL LAW TO BE APPLIED TO THIS GUARANTY IN NATIONWIDE USE PRECLUDES THE ASSERTION OF THE DEFENSES WHICH APPELLANTS NOW SEEK TO RAISE.

In their brief to this Court, appellants raise three defenses to this action to enforce their unconditional guaranty of payment. The short of the matter is that each of these defenses, if they be defenses to such a guaranty, which is doubtful, was specifically waived in the guaranty itself. Federal law, in common with the general common law, allows such waivers, as we show below.

A. The Defense of Failure of SBA to Sue On Demand Was Waived By The Appellants By the Terms of Their Guaranty.

Appellants contend that they were released from their unconditional guaranty of payment by the failure of SBA to

bring suit within 60 days after demand, 14/ as required by Arizona Rev. Stat. §§ 12-1641, 12-1646. The short answer to this, of course, is that they specifically agreed that:

> The undersigned hereby grants to SBA full power, in its uncontrolled discretion and without notice to the undersigned * * * to deal in any manner with the Liabilities and the collateral, including * * * the following powers:
>
> > (a) to modify or otherwise change any terms of all or any part of the Liabilities * * * to grant any * * * indulgence with respect thereto * * * (b) To enter into any agreement of forbearance with respect to all or any part of the Liabilities * * * (e) In the event of the non-payment when due * * * of any of the Liabilities * * * to realize on the collateral or any part thereof * * * by foreclosure or otherwise, or to forbear from realizing thereon, all as SBA in its uncontrolled discretion may deem proper * * *.
>
> The obligations of the undersigned hereunder shall not be released, discharged or in any way affected, nor shall the undersigned have any rights or recourse against SBA by reason of any action SBA may take or omit to take under the foregoing powers.
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> In case the Debtor shall fail to pay all or any part of the Liabilities when due * * * the undersigned, immediately upon the written demand of SBA, will pay to SBA the amount due and unpaid by the Debtor as aforesaid, in like

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14/ For the purpose of this discussion, the allegations that an effective demand under Arizona law was made by plaintiff must be taken as true, as a result of the posture of the case. In fact, there is considerable question whether suit could have brought within the meaning of the Arizona statute, since the property was involved in litigation and the amounts due were still uncertain. Cf. Prescott Nat. Bk. v. Head, 11 Ariz. 213, 90 P. 328.

> manner as if such amount constituted the direct and primary obligation of the undersigned. SBA shall not be required, prior to any such demand on, or payment by, the undersigned, to make any demand upon or pursue or exhaust any of its rights or remedies against the Debtor or others with respect to the payment of any of the Liabilities, or to pursue or exhaust any of its rights or remedies with respect to any part of the collateral.

(R. 21).

Thus, in the contract of guaranty they executed in order to obtain the SBA loan for their company, appellants gave SBA the power to grant any indulgence to or enter into an agreement of forbearance with the company and the power to forbear from realizing on the collateral, all as SBA in its discretion should deem proper. They agreed that their obligations as guarantors should not be affected nor should they have any rights against SBA by reason of SBA's exercise of any of the powers so granted. And they contracted that SBA should not be required to pursue or exhaust any of its rights or remedies against the debtor or the collateral before proceeding against them as guarantors.

Plainly, then, appellants have waived any right they might otherwise have had to require SBA to bring suit against the debtor and any rights which might accrue as a result of failure of SBA to pursue the debtor. Indeed, under common law, a creditor loses no rights against a surety or guarantor of payment merely as a result of failure to bring suit. Restatement of Security, § 130. For, "since the surety may pay the claim of the creditor and himself

proceed against the principal for exoneration in advance of payment (§ 112), the creditor's non-action generally affords no equitable basis for a claim of discharge by the surety." Id., comment (a). Even a binding contract between the creditor and the principal to extend the time of payment, which would normally discharge the surety, does not discharge him if he has agreed in his surety contract that this may be done, as appellants did here. Restatement of Security, § 129, comment (b).

Assuming that appellants did gain a right to demand suit by SBA as a result of the Arizona statutes, however, that right was clearly waived in the contract of guaranty. Such a right is not rendered non-waivable as a matter of public policy, for, as the First Circuit held long ago in a case on all fours with this one, "no reason can be suggested for sustaining any such proposition." Continental & Commercial Nat. Bank of Chicago v. Cobb, 200 Fed. 511 (C.A. 1). 15/ Thus as a matter of federal as well as common law, the defense here asserted has been waived. The Cobb case is dispositive.

B. The Defense of Laches Is Not Applicable Here.

The essence of a defense of laches is an unreasonable delay. That defense is not applicable here for two reasons.

15/ See also 38 C.J.S. Guaranty § 61(b), p. 122; Stearns, Law of Suretyship (5th Ed.) § 6.33, p. 157-158.

First, appellants misconceive the application of this defense, in their attempt to raise it to defeat an action at law on an unconditional guaranty of payment. Delay of a creditor is a defense only to a guarantor of collection, not to a guarantor of payment. Restatement of Security, § 130, see pp. 17, 18, supra. Since appellants unconditionally guaranteed payment of the debt (R. 21), they cannot here raise a defense of delay. 16/ And even if such a defense were otherwise available to them it is plain that it has been waived in the guaranty. For, as noted, supra, they expressly gave SBA the power, with respect to the debtor, "to grant any * * * indulgence" and "to enter into any agreement of forbearance"; and with respect to the collateral, "to forbear from realizing thereon, all as SBA in its uncontrolled discretion may deem proper." And they agreed that the exercise of these powers would not release them as guarantors. Appellants cannot now be heard to renounce their own contract.

Second, a defense of laches is simply not available against the United States. This suit, as demonstrated above, is an attempt to reclaim for the treasury monies lent by an agency of the United States in the fulfillment of a statutory mandate. Appellants' contention that laches may apply to "proprietary" functions of the government is mistaken in conceiving the SBA to be "proprietary", and, in any event, overlooks controlling authority. For, as the Supreme Court

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16/ See also Stearns, Law of Suretyship, (5th Ed.) § 6.35.

has stated, Federal Land Bank v. Bismarck Co., 364 U.S. 95, 102:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives, the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental.

And, as the Court said in answer to a similar contention:

> Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it.

Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383. Thus, in a case arising out of claims on FHA loans, which is not distinguishable from this case, the Court said:

> It is well settled that the United States is not barred by state statutes of limitations or subject to the defense of laches in enforcing its rights.

United States v. Summerlin, 310 U.S. 414, 416; See Board of Commissioners of Jackson County v. United States, 308 U.S. 343, 351.

Thus, even if laches were a relevant defense to a claim on a guarantee of payment, which it is not, it could not apply here. 17/

17/ In 1966, Congress passed a six year statute of limitation on the government's enforcement of claims generally. 80 Stat. 304, 28 U.S.C.A. 2415. The delay here is less than six years. Indeed, by the terms of the statute, the six year period does not begin to run on claims which accrued prior to passage until July 18, 1966. 28 U.S.C.A. 2415(g).

C. The Defense of Willful Impairment of Security Is Not Available.

The "willful impairment of security" alleged is specified (Appellants' Br. pp. 3, 13-14) as merely the delay in bringing this suit. Appellants, by this simple variation in terminology, seek to resuscitate the defense of laches, which does not exist under this type of guaranty and which they have waived in any event. This they may not do. United States v. Houff, 202 F. Supp. 471 (W.D. Va.), affirmed 312 F. 2d 6; United States v. Basil's Family Supermarket, Inc., 259 F. Supp. 139 (S.D. N.Y.). Cf. United States v. Newton Livestock Auction Market, Inc., 336 F. 2d 673 (C.A. 10). These cases, construing this contract of guarantee, make it absolutely clear that there is nothing here alleged which could defeat the recovery granted by the district court. The Houff case is directly in point. Noting that the "willful failure to act" clause of the guaranty applied to actual physical damage to the collateral rather than loss of value merely through delay, 202 F. Supp. 471, 479, 480, that court said:

> In other words there is no claim that the SBA intentionally sold the goods so that they would not bring their full value but rather that it intended to sell as it did sell and that the result of such sale was that, irrespective of intent as to getting full value, the goods did not in fact bring their full value.
>
> I believe, however, that the word willfully as used in the act refers to an intent to bring about the deterioration of the property. As said in Hazle v. Southern Pac. Co., 9 Cir., 173 F. 431.
>
> 'A "willful" Act is one that is done knowingly and purposely, with the direct object in view of injurying another'
>
> And no such intent is now charged.

Thus it is plain that the district court correctly determined that none of appellants' alleged defenses could defeat the action on the guaranty. 18/

CONCLUSION

For the above stated reasons, the decision of the court below should be affirmed.

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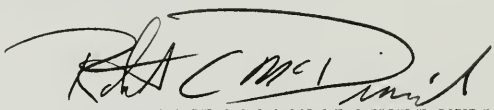
Washington, D. C. 20530.

MAY 1967

18/ Even if Arizona law governed this case, which it does not, we have found, and appellants cite, no authority for the proposition that Arizona law, in opposition to the general common law rule, makes the waiver of the defenses now asserted void as against public policy. Cf. 38 C.J.S. Guaranty § 61(b), p. 122; Continental & Commercial Nat. Bank of Chicago v. Cobb, 200 Fed. 511 (C.A. 1).

CERTIFICATE

I hereby certify that, in connection with the prepartion of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



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